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# **COMMERCE COUNCIL MEETING PACKET**

**Tuesday, April 25, 2006  
9:00 -10:00 a.m.  
Morris Hall**

# **Council Meeting Notice**

## **HOUSE OF REPRESENTATIVES**

**Speaker Allan G. Bense**

### **Commerce Council**

**Start Date and Time:** Tuesday, April 25, 2006 09:00 am

**End Date and Time:** Tuesday, April 25, 2006 10:00 am

**Location:** Morris Hall (17 HOB)

**Duration:** 1.00 hrs

#### **Consideration of the following bill(s):**

HB 1199 CS Statewide Cable Television Franchises by Traviesa

After the 45th day of a regular session, the amendment deadline for nonappointed members is two hours prior to the scheduled meeting.

**NOTICE FINALIZED on 04/24/2006 16:18 by GLATFELTER.SUKIE**



## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** HB 1199 CS  
**SPONSOR(S):** Traviesa and others  
**TIED BILLS:**

Statewide Cable Television Franchises

**IDEN./SIM. BILLS:**

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) Utilities & Telecommunications Committee	11 Y, 4 N, w/CS	Cater	Holt
2) Finance & Tax Committee	7 Y, 2 N, w/CS	Noriega	Diez-Arguelles
3) Commerce Council		Cater	Randle
4)			
5)			

### SUMMARY ANALYSIS

This bill establishes the authority to issue statewide cable franchises within the Department of State (DOS), and designates DOS as the state franchising authority. The bill preempts local government authority to negotiate cable service franchises.

The bill creates ss. 610.102 through 610.116, F.S., to create the new franchising authority. Generally, the bill:

- Provides definitions;
- Provides procedures for application of a state-issued certificate of franchise authority (certificate), including provisions for a cable operator with an existing franchise in a municipality or county to obtain a certificate for its current franchise area;
- Prohibits franchise fees imposed by the state or by local governments, although franchise fees are collected through the Communications Services Tax (CST);
- Prohibits buildout requirements;
- Provides that an incumbent cable provider must abide by customer service standards reasonably comparable to those in the Federal Communications Commission (FCC or Commission) rules until there are two or more cable service providers in the relevant area;
- Provides guidelines for the number of public, educational, and government (PEG) channels to be provided in a certain area, including guidelines to demonstrate when a channel is considered substantially used;
- Provides that for a period of two years, new certificateholders must pay the municipality or county one percent of the certificateholders' monthly revenues from the retail sale of cable services. After the two-year period, the certificateholder must pay the municipality or county up to one percent of revenues, but only if the municipality or county affirmatively approves such continued payment. These payments are to be used to construct and operate PEG channels;
- Prohibits municipalities or counties from discriminating against certificateholders for items such as access to rights-of-ways, buildings or property, terms of utility pole attachments, filing certain documents with the municipality or county;
- Prohibits discrimination against subscribers based on income;
- Provides that following a transition period, complaints regarding cable service are to be accepted by the Department of Agriculture and Consumer Services (DACS);
- Requires the Office of Program Policy Analysis and Governmental Accountability (OPPAGA) to submit a report to the Legislature on the status of cable competition; and
- Requires rulemaking by DOS and DACS.

The bill also amends statutes related to the CST and the use of rights-of-way to conform to this act.

According to the DOS, for fiscal year 2006-2007 there is a fiscal impact of \$850,116, with \$83,888 being non-recurring costs. DACS estimates for fiscal year 2006-2007, it will have a fiscal impact of \$1, 919,712, of which \$547,586 would be non-recurring.

The Revenue Estimating Conference has estimated that, over time, this bill will have a statewide indeterminate fiscal impact in local governments of at least \$30.0 million, with the potential to be significantly higher.

The bill may be a mandate requiring a two-thirds vote of the membership of each house, and provides for an effective date of July 1, 2006.

**This document does not reflect the intent or official position of the bill sponsor or House of Representatives.**

**STORAGE NAME:** h1199d.CC.doc  
**DATE:** 4/24/2006

## FULL ANALYSIS

### I. SUBSTANTIVE ANALYSIS

#### A. HOUSE PRINCIPLES ANALYSIS:

Provide Limited Government: The bill establishes the authority to issue statewide cable franchises within the Department of State (DOS), and designates DOS as the state franchising authority. The bill preempts local government authority to negotiate cable service franchises. Further, the Department of Agriculture and Consumer Services (DACS) is authorized to handle cable service complaints.

#### B. EFFECT OF PROPOSED CHANGES:

##### Background

##### Federal Law

In 1965, the FCC established rules for cable systems that used microwave antennas to receive signals. The following year, the FCC established rules for all cable systems. In 1968, The United States Supreme Court affirmed the FCC's jurisdiction over cable. In 1972, FCC rules went into effect that required cable television operators to obtain a certificate of compliance from the FCC prior to operating a cable television system or adding a television broadcast signal. Two other issues addressed in these rules were franchise standards and technical standards. Soon afterwards many of these rules were either modified or eliminated.

In 1984, Congress passed the Cable Communications Policy Act of 1984 (1984 Cable Act). This law established policies in such areas as franchise provisions and renewals, subscriber rates and policy, as well as pole attachments. This law also defined jurisdictional boundaries among federal, state, and local governments regulating cable television systems, and prohibited cable operators from providing service without obtaining a franchise from the local franchise authority (LFA). Also, this law required the LFA's to assure that cable service is not denied to residential customers based on their income, and allows a reasonable period of time for a cable company to provide service to all households in the franchise area. Additionally, the law provided that the LFA may require assurances from the cable company that it will provide adequate capacity, facilities, or financial support for PEG access channels.

In 1992, Congress passed the 1992 Cable Act, which provides that a franchising authority may award one or more franchises within its jurisdiction, but it may not award an exclusive franchise or unreasonably refuse to award an additional competitive franchise.

##### *Current Cable Act*

The purposes of the Federal Cable Act (Cable Act), as found in 47 U.S.C. s. 521 are to:

- (1) Establish a national policy concerning cable communications;
- (2) Establish franchise procedures and standards which encourage the growth and development of cable systems and which assure that cable systems are responsive to the needs and interests of the local community;
- (3) Establish guidelines for the exercise of Federal, state, and local authority with respect to the regulation of cable systems;
- (4) Assure that cable communications provide and are encouraged to provide the widest possible diversity of information sources and services to the public;
- (5) Establish an orderly process for franchise renewal which protects cable operators against unfair denials of renewal where the operator's past performance and proposal for future performance meet the standards established by this subchapter; and

- (6) Promote competition in cable communications and minimize unnecessary regulation that would impose an undue economic burden on cable systems.

### *Federal Franchise Requirements*

The Federal Cable Act, 47 U.S.C. s. 541 et. seq., allows a franchising authority to award one or more franchises within its jurisdiction, except that it may not issue an exclusive franchise or unreasonably refuse to award an additional competitive franchise.

The franchise is to be construed to authorize the construction of a cable system over public rights-of-way and through easements; except that in using the easements the cable operator shall ensure:

- The safety, functioning, and appearance of the property and the convenience and safety of others not adversely affected by the installation or construction of cable facilities;
- The cost of installation, construction, operation, or removal of such facilities by the cable operator or subscribers, or both; and
- The owner of the property is justly compensated by the cable operator for any damages caused by the installation, construction, and operation of facilities.

In awarding the franchise, the LFA:

- Shall allow the applicant's cable system reasonable time to be able to provide cable service to all households;
- May require adequate assurance that the cable operator will provide adequate PEG access channel capacity, facilities, or financial support; and
- May require adequate assurances that the cable operator has the financial, technical, and legal qualifications to provide cable service.

In awarding franchises, the LFA shall assure that access to cable service is not denied to a group of potential subscribers because of their economic status.

Also, federal law does not require persons who lawfully provided cable service without a franchise on July 1, 1984, to obtain a franchise, unless the LFA requires them to do so.

### *Pending Federal Legislation*

There are several proposals concerning cable regulation that are currently pending in Congress. The following are summaries of some of those proposals:

#### **Broadband Investment and Consumer Choice Act- S. 1504, by Ensign (R-NV)**

This bill provides that any provider of video services, including existing cable operators, may provide service without obtaining a state or local video franchise. State or local governments may require a reasonable fee to compensate the local government for the costs of managing the public rights-of-way used by the provider, which may not exceed five percent of gross revenues received from subscribers for the provision of video service.

#### **Video Choice Act of 2005- S. 1349, by Rockefeller (D-WV), by Smith (R-OR)**

This bill provides that any entity with existing rights-of-way authority (e.g., the Bells and other utilities) may provide video programming without obtaining a cable franchise. Existing cable operators would not be entitled to any relief. A "competitive video services provider" "may" be subject to the payment of local franchise fees.

#### **Digital Age Communications Act- S. 2113, by DeMint (R-TN)**

This bill provides that existing cable franchise agreements remain in effect until the earlier of the agreement's expiration or four years after enactment. States and their political subdivisions may not

renew, extend or otherwise enforce the terms of existing cable franchise agreement beyond these limits. Until an existing agreement is terminated, a state or political subdivision may require competing video service providers to contribute an equitable portion of costs associated with any fees directly attributable to the agreement and the provision of any public access channels required by such agreement.

**Reps. Barton (R-TX), Rush (D-IL), Upton (R-MI), Pickering (R-MS)** (no bill number assigned yet)

This bill provides that a "new cable operator" that begins providing cable service in a franchise area after date of enactment may elect to obtain a national franchise in lieu of a local franchise. An existing cable operator can obtain national franchise for franchise areas where a new entrant "is providing" service under a national franchise. The franchise fee is the same as current law (up to 5 percent of gross revenues, with the exact level determined by LFA), plus any additional fee imposed by locality for rights-of-way "management."

**Principles of Sens. Burns (R-MT) and Inouye (D-HI)**

- Recognize and Reaffirm the Role of States and Localities in the Video Franchising Process;
- Promote Competition by Facilitating Speedy Entry on Fair Terms; and
- Promote Competitive Neutrality and a Level Playing Field.

*Federal Rulemaking*

On November 18, 2005, the FCC released a *Notice of Proposed Rulemaking (NOPR)* to initiate a proceeding to further the interrelated goals of enhanced cable competition and accelerated broadband deployment. The FCC tentatively concluded that the mandate of Section 621(a)(1) of the Cable Act (47 U.S.C. s. 547(a)(1)) should be interpreted to prohibit not just the ultimate refusal to award a franchise, but also a broader range of behaviors, and the *NOPR* seeks comment on that conclusion.

The relevant section of the federal Cable Act states:

- (a) Authority to award franchises; public rights-of-way and easements; equal access to service; time for provision of services; assurances

(1) A franchising authority may award, in accordance with the provisions of this subchapter, 1 or more franchises within its jurisdiction; except that a franchising authority may not grant an exclusive franchise and may not unreasonably refuse to award an additional competitive franchise. Any applicant whose application for a second franchise has been denied by a final decision of the franchising authority may appeal such final decision pursuant to the provisions of section 555 of this title [judicial proceedings] for failure to comply with this subsection.

The *NOPR* addresses a broad range of questions, including:

- If local franchising authorities are unreasonably refusing to grant competitive franchises. The *Notice* also asks what problems cable incumbents have encountered with LFAs, including how best the Commission can ensure that the local franchising process is not inhibiting the ability of incumbent cable operators to invest in broadband services;
- Whether the Commission has authority to implement the pro-competitive mandate of Section 621(a)(1). The *NOPR* tentatively concludes that the Commission is empowered by provisions of both Title I and Title VI of the Communications Act to take steps appropriate to ensure that the local franchising process does not serve as an unreasonable barrier to entry for competitive cable operators. The *NOPR* also tentatively concludes that the Commission may deem to be preempted and superseded any law or regulation of a State or LFA that causes an unreasonable refusal to award a competitive franchise in contravention of Section 621(a);

- The *NOPR* tentatively concludes that it is not unreasonable for an LFA, in awarding a franchise, to “assure that access to cable service is not denied to any group of potential residential cable subscribers because of the income of the residents of the local area in which such group resides”; “allow [a] cable system a reasonable period of time to become capable of providing cable service to all households in the franchise area”; and “require adequate assurance that the cable operator will provide adequate public, educational and governmental access channel capacity, facilities, or financial support”;
- Assuming there is both the need and the authority for Commission intervention, the *NOPR* asks how the Commission should interpret the mandate of Section 621(a)(1). The item tentatively concludes that the Commission should interpret the relevant language of Section 621(a)(1) broadly in order to prohibit not only unreasonable refusals to award competitive franchises, but also the establishment of procedures and other requirements that unreasonably interfere with the ability of would-be new entrants to introduce their competitive offerings quickly;
- What specific steps the Commission should take to implement Section 621(a)(1);
- The *NOPR* additionally seeks comment on whether the Commission has the authority to establish a minimum amount of time for potential competitors with existing facilities to build out their networks beyond their current service territories. It also seeks comment on what would constitute a reasonable minimum timeframe; and
- The *NOPR* asks whether the Commission should address actions at the state level, to the extent we find such actions create unreasonable barriers to entry for potential competitors.

Comments were filed on February 13, 2006. Reply comments were filed March 28, 2006. It is unknown when the FCC will make its decision.

### State Law

In 1987, the Legislature enacted s. 166.046, F.S., providing minimum standards for cable television franchises. Section 166.046(2), F.S., provides that:

2) No municipality or county shall grant a franchise for cable service to a cable system within its jurisdiction without first, at a duly noticed public hearing, having considered:

- (a) The economic impact upon private property within the franchise area;
- (b) The public need for such franchise, if any;
- (c) The capacity of public rights-of-way to accommodate the cable system;
- (d) The present and future use of the public rights-of-way to be used by the cable system;
- (e) The potential disruption to existing users of the public rights-of-way to be used by the cable system and the resultant inconvenience which may occur to the public;
- (f) The financial ability of the franchise applicant to perform;
- (g) Other societal interests as are generally considered in cable television franchising; and
- (h) Such other additional matters, both procedural and substantive, as the municipality or county may, in its sole discretion, determine to be relevant.

Moreover, s. 166.046(3), F.S., provides that a municipality or county cannot grant any overlapping cable franchises on terms or conditions that are more favorable or less burdensome than existing franchises.



Cable service is taxed pursuant to the Communications Services Tax (CST) contained in ch. 202, F.S. Cable companies are subject to regulation for the use of rights-of-way under s. 337.401, F.S.

### Franchise Agreements

In order to provide cable service in Florida, a cable company is required to obtain a franchise agreement from the LFA, which is either the municipality or the county. The local franchise agreements address issues such as rates, customer service standards, buildout, the number of PEG channels, support for PEG channels, use of rights-of-way, and service to government buildings.

### Proposed Changes

The bill creates the "Consumer Choice Act of 2006."

### Statewide Cable Franchises

The bill creates ss. 610.102 through 610.116, F.S., to provide for statewide franchising authority.

Section 610.102, F.S., establishes authority within DOS to issue statewide cable franchises, and designates DOS as the state franchising authority, pursuant to 47 U.S.C. s. 522(10). The bill preempts local government authority to negotiate cable service franchises. Additionally, municipalities and or counties are prohibited from granting new franchises for provisioning cable service within their respective jurisdictions.

### *Definitions*

Section 610.103, F.S., provides the following definitions as used in ss. 610.102-610.114, F.S.:

**Cable service**-(a) The one-way transmission to subscribers of video programming or any other programming service; (b) Subscriber interaction, if any, that is required for the selection of such video programming or other programming service.

**Cable system**-a facility consisting of a set of closed transmission paths and associated signal generation, reception, and control equipment that is designed to provide cable service that includes video programming and that is provided to multiple subscribers within a community, but such term does not include: (a) a facility that serves only to retransmit the television signals of one or more television broadcast stations; (b) a facility that serves only subscribers in one or more multiple-unit dwellings under common ownership, control, or management, unless such facility or facilities use any public right-of-way; (c) a facility that serves subscribers without using any public right-of-way (i.e. satellite service); (d) a facility of a common carrier that is subject, in whole or in part, to the provisions of 47 U.S.C. s. 201 et. seq. (federal common carrier regulation), except the specific bandwidths or wavelengths over such facility shall be considered a cable system only to the extent such bandwidths or wavelengths are used in the transmission of video programming directly to subscribers, unless the extent of such use is solely to provide interactive on-demand services (i.e. video programming from internet websites), in which case it is not a cable system; or (e) any facilities of any electric utility used solely for operating its electric utility systems.

With the definition of "cable system" exempting interactive on-demand service, concern has been raised that the definition also creates an exemption from the requirement to obtain a franchise for providers of internet-protocol television (IPTV). However, some providers have argued that IPTV does not trigger local cable franchise requirements. The IPTV technology is an interactive delivery service as opposed to a traditional cable service that provides one-way transmission.<sup>1</sup>

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<sup>1</sup> AT&T and BellSouth Comments to the FCC in MB Docket No. 05-311. February 13, 2006.

**Cable service provider**-a person that provides cable service over a cable system.

**Certificateholder**-a cable service provider that has been issued and holds a certificate of franchise authority from the department.

**Department**-the Department of State.

**Franchise**-an initial authorization or renewal of an authorization, regardless of whether the authorization is designated as a franchise, permit, license, resolution, contract, certificate, agreement, or otherwise, to construct and operate a cable system in the public right-of-way.

**Franchise authority**-any governmental entity empowered by federal, state, or local law to grant a franchise.

**Incumbent cable service provider**-the cable service provider serving the largest number of cable subscribers in a particular municipal or county franchise area on July 1, 2006.

**Public right-of-way**-the area on, below, or above a public roadway, highway, street, sidewalk, alley, or waterway, including, without limitation, a municipal, county, state, district, or other public roadway, highway, street, sidewalk, alley, or waterway.

**Video programming**-programming provided by, or generally considered comparable to programming provided by, a television broadcast station.

#### *State Authorization to Provide Cable Service*

Section 610.104, F.S., outlines the procedures and requirements associated with applying to DOS for a state-issued certificate, including applicant criteria and information to be included in the application. The bill provides that after July 1, 2006, an entity or person who seeks to provide cable service, over a cable system, shall file an application with DOS for a state-issued certificate of franchise authority. An incumbent cable provider operating under an unexpired franchise agreement is not subject to this subsection with respect to that municipality or county until the franchise agreement or ordinance expires, except as provided in subsection (2) and s. 610.105(4), F.S. Additionally, as of July 1, 2006, an incumbent may seek a state-issued certificate to provide service in an area where it does not have an existing franchise agreement. Concern has been raised that this provision creates an unfair advantage for incumbent providers who are restricted to the terms and conditions of the unexpired franchise agreement.

A cable service provider who is not an incumbent may within 90 days after July 1, 2006,<sup>2</sup> elect to terminate an existing local franchise and seek a state-issued certificate by providing written notice to DOS, and the affected municipality, or county no later than 180 days after July 1, 2006. This non-incumbent provider also is required to provide cable service to less than 40 percent of the total cable service subscribers in a particular franchise area. The franchise is terminated on the date DOS issues the certificate of franchise authority. It is unclear how 40 percent was established as the criteria. Also, no methodology is included for determining the service area percentage or the entity that performs the calculation.

DOS is required to notify the applicant within 10 business days as to whether the application is complete. If DOS denies the application, it must specify the particular reason that it is denying the application and allow the applicant to amend the application to cure the deficiency. The applicant shall be permitted to amend the application to cure any deficiency and DOS shall act upon the amended application within five business days.

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<sup>2</sup> The actual time frame would be between September 29 and December 28, 2006.

By the 30<sup>th</sup> business day after receiving a completed affidavit signed by an officer of general partner of the applicant, DOS shall issue a certificate of franchise authority. The affidavit shall affirm:

- That the applicant has filed or will timely file with the FCC, all forms required by the agency in advance of offering cable service;
- That the applicant agrees to comply with all applicable federal and state laws and regulation, to the extent that such state laws and rules are not in conflict with or superseded by provisions of this chapter or other applicable state law;
- That the applicant agrees to comply with all lawful state laws and regulations regarding the placement and maintenance of communications facilities in public right-of-way that are generally applicable to providers of communications services;
- A description of the service area for which the applicant seeks certificate of franchise authority, which need not be coextensive with municipal, county, or other political boundaries; and
- The location of the applicant's principal place of business and the names of the applicant's principal executive office.

If DOS does not act on an application within 30 business days of receipt, the application shall be denied. Prior to the expiration of the 30-day period, the applicant may request an automatic 30-day extension or challenge the denial through a petition of mandamus<sup>3</sup> in a court of competent jurisdiction. Concern has been raised that no financial viability needs to be demonstrated in order for an entity to obtain a state-issued certificate. However, proponents feel the market will determine company success in a franchise area.

The certificate of franchise authority issued by DOS shall contain:

- A grant of authority to provide cable service over a cable system as requested in the application;
- A grant of authority to construct, maintain, and operate facilities through, upon, over, and under any public right-of-way or waters; and
- A statement that the grant of authority is subject to the lawful operation of the cable system to provide cable service to the applicant or successor in interest.

If a certificateholder seeks to include additional service areas in its current certificate, it shall file notice with DOS to reflect the new service area or areas.

Federal law allows franchises to require the franchise authority to approve the sale or transfer of a cable system, and gives the franchise authority 120 days to act upon the request for approval or the approval is deemed granted. (47 U.S.C. s. 537). The bill provides that the certificate issued by DOS is fully transferable to any successor in interest to the applicant to which the certificate was initially granted. The notice of transfer shall be filed with DOS and the relevant municipality or county within 14 business days following the completion of the transfer.

The certificate of franchise authority issued by DOS may be terminated by the cable service provider by written notice. Concern was raised that DOS has no grounds to cancel a certificate of franchise authority.

DOS is granted rulemaking authority pursuant to ss. 120.536(1) and 120.54, F.S., to implement the provisions of this section. DOS may also establish a standard application form, in which case the application must be on such form and accompanied by a fee established by DOS, not to exceed \$10,000. In addition to the application fee, each certificateholder shall pay an annual fee established by DOS based on the number of the certificateholder's subscribers, not to exceed \$10,000. The fees shall be based on the costs incurred by DOS in performing its duties under the provisions of this act.

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<sup>3</sup> Mandamus is ordering a public agency or government body to perform an act required by law when it has neglected to do so. mandamus. (n.d.) *The People's Law Dictionary*. (2005). Retrieved March 27, 2006 from <http://legal-dictionary.thefreedictionary.com/mandamus>.

### *Eligibility for State-Issued Franchises*

Section 610.105, F.S., establishes, in more detail, eligibility for a state-issued franchise. The bill provides in s. 610.105(1), F.S., except as otherwise provided, that an incumbent cable service provider with an existing, unexpired cable franchise, as of July 1, 2006, is not eligible to seek a state-issued certificate until the franchise expires.

For purposes of this section, a cable service provider is deemed to have or have had a franchise to provide cable service in a specific municipality or county, if any affiliate or successor entity of the cable service provider has or had a franchise agreement granted, by that specific municipality or county. Also, for purposes of this section, "affiliate or successor entity" refers to an entity receiving, obtaining, or operating under a franchise that directly or indirectly owns or controls, is owned or controlled by, or is under common ownership or control with the cable service provider.

Section 610.105(4), F.S., provides that an incumbent cable service provider may elect to terminate an existing local franchise agreement and seek a state-issued certificate of franchise authority when another provider has been granted a state-issued certificate for an area located in whole or in part within the service area covered by the incumbent's existing franchise.

Termination of the existing franchise under this subsection is achieved by submitting written notice to DOS, and to the affected municipality or county within 180 days following the issuance of the state certificate to the non-incumbent.

The existing franchise may be terminated by providing written notice to DOS and the municipality or county within 180 days of the issuance of the state-issued certificate to the nonincumbent cable service provider. The franchise issued by the municipality or county is terminated as of the date the state-issued certificate to the non-incumbent provider. Concern has been raised regarding this provision being an unconstitutional impairment of contracts.

### *Franchise Fees*

The Federal Cable Act allows LFAs to assess a franchise fee. The fee is not to exceed five percent of the cable operator's gross revenues derived from the operation of the cable system to provide cable service.

Section 610.106, F.S., prohibits DOS, as well as municipalities and counties from imposing any taxes, fees, charges, or other impositions, or extractions on certificateholders in connection with use of public right-of-way as a condition of doing business in a municipality or county, except those permitted by the CST (ch. 202, F.S.) and the use of the right-of-way (s. 337.401(6), F.S.).

### *Buildout*

Federal law provides that in awarding a franchise, the LFA is required to allow the applicant cable system a reasonable amount of time to become capable of providing cable service to all households in the franchise area.

Buildout is a requirement in a franchise that requires the cable service provider to provide a service to customers in the local franchise area within a reasonable period of time. According to information provided by local governments, buildout requirements prevent the cable operators from "cherry picking" markets and individual customers within a franchise area. Local governments also argue that the buildout requirements let local governments discourage disparate levels of service in their franchise area.

Section 610.107, F.S., prohibits any franchising authority, state agency, or political subdivision from imposing any buildout requirements on a state-issued certificateholder. However, each certificateholder, if requested pursuant to a bona fide order for cable service, shall make cable service available at each building used for municipal or county purposes, including, but not limited to, emergency operations centers,

fire stations, and public schools, within the area described in its application under s. 610.104(4)(d), F.S., within 5 years after the date of the issuance of its certificate by DOS using the technology of its choice.

### *Customer Service Standards*

Federal rules in 47 C.F.R. s. 76.309(c), provide the following minimum cable service standards, which the LFA may enforce with 90 days written notice to the cable provider:

(c) Effective July 1, 1993, a cable operator shall be subject to the following customer service standards:

(1) Cable system office hours and telephone availability--

- (i) The cable operator will maintain a local, toll-free or collect call telephone access line which will be available to its subscribers 24 hours a day, seven days a week;
  - (A) Trained company representatives will be available to respond to customer telephone inquiries during normal business hours;
  - (B) After normal business hours, the access line may be answered by a service or an automated response system, including an answering machine. Inquiries received after normal business hours must be responded to by a trained company representative on the next business day;
- (ii) Under normal operating conditions, telephone answer time by a customer representative, including wait time, shall not exceed thirty (30) seconds when the connection is made. If the call needs to be transferred, transfer time shall not exceed thirty (30) seconds. These standards shall be met no less than ninety (90) percent of the time under normal operating conditions, measured on a quarterly basis;
- (iii) The operator will not be required to acquire equipment or perform surveys to measure compliance with the telephone answering standards above unless a historical record of complaints indicates a clear failure to comply;
- (iv) Under normal operating conditions, the customer will receive a busy signal less than three (3) percent of the time; and
- (v) Customer service center and bill payment locations will be open at least during normal business hours and will be conveniently located.

(2) Installations, outages and service calls. Under normal operating conditions, each of the following four standards will be met no less than ninety five (95) percent of the time measured on a quarterly basis:

- (i) Standard installations will be performed within seven (7) business days after an order has been placed. "Standard" installations are those that are located up to 125 feet from the existing distribution system;
- (ii) Excluding conditions beyond the control of the operator, the cable operator will begin working on "service interruptions" promptly and in no event later than 24 hours after the interruption becomes known. The cable operator must begin actions to correct other service problems the next business day after notification of the service problem;
- (iii) The "appointment window" alternatives for installations, service calls, and other installation activities will be either a specific time or, at maximum, a four-hour time block during normal business hours. (The operator may schedule service calls and other installation activities outside of normal business hours for the express convenience of the customer);
- (iv) An operator may not cancel an appointment with a customer after the close of business on the business day prior to the scheduled appointment; and
- (v) If a cable operator representative is running late for an appointment with a customer and will not be able to keep the appointment as scheduled, the customer will be contacted. The appointment will be rescheduled, as necessary, at a time which is convenient for the customer.

(3) Communications between cable operators and cable subscribers--

- (i) Refunds--Refund checks will be issued promptly, but no later than either--

- (A) The customer's next billing cycle following resolution of the request or thirty (30) days, whichever is earlier, or
  - (B) The return of the equipment supplied by the cable operator if service is terminated.
- (ii) Credits--Credits for service will be issued no later than the customer's next billing cycle following the determination that a credit is warranted.

Currently, many cable franchise agreements and cable television ordinances include customer service provisions. In addition to the above requirements, there may be provisions concerning notice prior to construction, and requiring employees in the field to carry photo identification.

Section 610.608, F.S., requires an incumbent cable service provider to comply with customer service standards reasonably comparable to the federal standards, until there are two or more providers in the relevant service area, excluding direct-to-home satellite service.

On or before January 1, 2009, cable service providers in municipalities or counties that have an office or department dedicated to cable service quality complaints as of January 1, 2006, are to redirect any complaints to DACS. However, until this function is transferred to DACS, these complaints are to be handled by the municipality or county, but this shall not be construed to allow them to impose customer service standards that conflict with s. 610.608, F.S. The bill is silent as to whether or not DACS, prior to January 1, 2009, would handle cable service quality complaints from municipalities and counties that do not have a department or office to handle complaints.

The bill requires DACS to address cable service quality complaints in an expeditious manner by helping resolve the complaint between the complainant and the certificateholder. DACS is granted rulemaking authority to implement this section.

The term "reasonably comparable" is not defined in the bill. Concerns have been raised regarding: 1) DACS' lack of enforcement provisions; and 2) that there is no enforcement mechanism concerning these standards once two or more providers are providing service in a given area whether the standards are abandoned once an area has multiple providers.

Local governments have collected fines from cable operators as a result of violating the customer service provisions of a franchise.

#### *Public, Educational, and Government (PEG) Access Channels*

Since the 1984 Cable Act, LFAs may require cable operators to set aside channels for PEG use. In addition, LFAs may require cable operators to provide services, facilities, and equipment for the use of these channels. In general, cable operators are not permitted to control the content of programming PEG channels, but they may impose non-content-based requirements, such as minimum production standards, and they may mandate equipment user training.

PEG channel capacity which is not used for its designated purpose may, with the LFA's permission, be used by the cable operator to provide other services. Under certain conditions, a franchising authority may authorize the use of unused PEG channels to carry low power commercial television stations and local non-commercial educational television stations.

In s. 610.109, F.S., the bill provides detailed requirements for a certificateholder to provide PEG channels or equivalent capacity to municipalities and counties. This section also requires active use of these channels by the municipality or county using a variety of programming or the PEG channels will revert to the certificateholder. Additionally, this section requires interconnection, where technically feasible, between the certificateholder and the incumbent's cable systems for the purpose of providing PEG programming, so long as the programming does not bear the logo or name of the other cable service provider.

Additionally, if a certificateholder is providing cable service within a municipality's or county's jurisdiction, the certificateholder must designate a sufficient amount of capacity for non-commercial programming, as set forth in the bill, within 180 days.

Section 610.109(2), F.S., provides that if PEG channels were provided by the incumbent cable provider, the certificateholder must provide the same number of PEG channels supplied by the incumbent, until the expiration of the incumbent's existing franchise agreement or ordinance. For purposes of this section, a PEG channel is deemed activated if the channel is being used for PEG programming within the municipality for at least 10 hours a day. The certificateholder's obligations to provide adequate capacity continue regardless of whether the incumbent cable service provider becomes a certificateholder pursuant to this act after July 1, 2006, except as provided in ss. 610.109(3) and 610.109(5), F.S.

Section 610.109(3), F.S., provides that in a municipality or county receiving any PEG channels, the certificateholder must provide: i) up to three PEG channels for a municipality or county with a population of at least 50,000, or ii) up to two PEG channels for a municipality county with a population of less than 50,000.

Section 610.109(5), F.S., provides that if a municipality or county has not used the number of access channels or capacity equivalent to the number described above, access to additional channels or capacity shall be provided upon 180 days written notice, if the municipality or county meets the following standard:

- If the municipality or county has one active PEG channel and wished to activate one additional PEG channel, the initial channel is considered substantially used when it is programmed for 12 hours each calendar day. At least 40 percent of the twelve hours of programming for each business day on average must be nonrepeat programming, which is the first three videocastings of a program; and
- If the municipality or county is entitled to three PEG channels and has in service two active PEG channels, each of the two active channels shall be considered substantially used when 12 hours are programmed on each channel each calendar day and at least 50 percent of the 12 hours for each business day for each calendar quarter is nonrepeat programming for three consecutive quarters.

Section 610.109(6), F.S., provides that the operation of any PEG channel or capacity equivalent is the responsibility of the municipality or county receiving the benefit of such channel or capacity equivalent, and a certificateholder is only responsible for the transmission of the channel's content. The certificateholder is responsible for providing the connectivity to each PEG access channel distribution point up to the first 200 feet.

Section 610.109(7), F.S., provides that municipalities and counties are responsible for ensuring that all transmissions, content, or programming transmitted over a channel or facility by a certificateholder are provided or submitted to the cable service provider in a way that is capable of being accepted and transmitted by a provider without any requirement for additional alteration or change in content by the provider, over the particular network or the provider, which is compatible to the protocol utilized by the cable service provider to deliver services. The provision of PEG content to the provider authorizes the provider to carry such content, including, at the provider's option, the authority to carry contents beyond the jurisdictional boundaries of the municipality or county.

Section 610.109(8), F.S., provides that where technically feasible, the certificateholder and incumbent cable service provider are to use reasonable efforts to interconnect their cable systems to provide PEG programming. This interconnection may be accomplished through any reasonable means of interconnecting. The certificateholders and incumbent cable service providers are to negotiate in good faith and incumbent cable service providers may not withhold PEG channels.

Section 610.109(9), F.S., provides that a certificateholder is not required to interconnect, or otherwise transmit, PEG content that is branded with the identifying mark of another cable service provider, and the municipality or county may require a cable service provider to remove identifying marks from PEG content made available to another provider.

Section 610.109(10), F.S., provides that a court of competent jurisdiction has the exclusive jurisdiction to enforce any requirement under this section.

Section 610.109(11), F.S., provides that in support of the capital costs incurred by the municipality or county in connection with the construction or operation of PEG access facilities and content provided by a municipality or county pursuant to s. 610.109, F.S., the certificateholder shall pay to the municipality or county one percent of the certificateholder's monthly revenues from the retail sale of cable services provided to customers located within the respective municipal or county boundaries, based upon the certificateholder's books and records, for a period of two years after the date DOS issues a certificate to the certificateholder.

After the expiration of the two-year period, the certificateholder shall pay and the municipality or county shall continue to receive up to one percent of such revenues in support of the capital costs incurred by the municipality in connection with the construction or operation of PEG content provided by the municipality or county only if the governing body of the municipality or county affirmatively approves such continued payment. Upon such affirmative vote of approval, the certificateholder may recover from the customer its costs of the payment through a separately stated charge on the customer's bill. All payments made pursuant to s. 610.109(11), F.S., shall be made in the same manner as, and treated as part of, the certificateholder's payment of CST pursuant to s. 202.27, F.S., and all definitions, exemptions, and administrative provisions of ch. 202, F.S., shall apply to such payments.

#### *Nondiscrimination by Municipality or County*

The bill creates s. 610.110, F.S., which requires a municipality or county to allow a certificateholder, to install, construct, and maintain a network within a public right-of-way and provide the certificateholder with open, comparable, nondiscriminatory, and competitively neutral access to the public right-of-way in accordance with the state law regulating the use of the right-of-way by utilities.<sup>4</sup> The use of a right-of-way by a certificateholder is nonexclusive.

The municipality or county also may not discriminate against a certificateholder regarding the authorization or placement of a network in a public right-of-way, access to buildings or other property, or the terms of utility pole attachments.

Except as expressly provided in s. 610.110, F.S., nothing in ch. 610, F.S., shall be construed to limit or abrogate a municipality's or county's authority over the use of public rights-of-way under its jurisdiction, as provided in s. 337.401(3)(a), F.S.

#### *Limitations on Local Authority*

Section 610.112, F.S., prohibits a municipality or county from imposing additional requirements, except those expressly permitted by this chapter, on certificateholders, including financial, operational, and administrative requirements. A municipality or county may not impose on a certificateholder requirements for:

- Having business offices located in the municipality or county;
- Filing reports and documents with the municipality or county that are not required by state or federal law and are not related to the use of the public right-of-way;
- The inspection of a certificateholder's business records; and

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<sup>4</sup> S. 337.401, F.S.



- The approval of a transfer of ownership or control, but the municipality or county may require a notice of transfer within a reasonable time.

The municipality or county may require a permit for a certificateholder to place and maintain facilities in or on a public right-of-way. The permit may require the permitholder, at its own expense, to be responsible for any damage resulting from the issuance of a permit, and for restoring the public right-of-way to a substantially similar condition to that before such facilities were installed. The terms of the permit shall be consistent with construction permits issued to other providers of communications services placing or maintaining facilities in a public right-of-way.

### *Discrimination Prohibited*

Section 610.113, F.S., prohibits a certificateholder from denying access to service ("redlining") to potential residential subscriber because of the income of the residents in the local area where such group resides, which conforms to federal law. Enforcement may be sought by initiating a proceeding with DACS, pursuant to its powers of processing complaints in s. 570.544, F.S. Section 570.544(3), F.S., reads in part:

[T]he Division of Consumer Services shall serve as a clearinghouse for matters relating to consumer protection, consumer information, and consumer services generally. It shall receive complaints and grievances from consumers and promptly transmit them to that agency most directly concerned in order that the complaint or grievance may be expeditiously handled in the best interests of the complaining consumer. If no agency exists, the Division of Consumer Services shall seek a settlement of the complaint using formal or informal methods of mediation and conciliation and may seek any other resolution of the matter in accordance with its jurisdiction.

In determining whether a certificateholder has violated the above provision, cost, distance, and technological or commercial limitations shall be taken into account, and the certificateholder shall have a reasonable time to deploy service pursuant to federal law. It may not be considered a violation to use an alternative technology that provides comparable content, service, and functionality. The inability to access a building is also not considered a violation. The section is not to be construed to authorize any buildout requirements. DACS is required to adopt the procedural rules necessary to implement this section.

While the bill prohibits discrimination based on income (redlining), concern was raised that the bill does not prohibit a certificateholder from refusing to serve a certain area due to other factors such as it being uneconomical to serve a specific area (cherry picking).

### *Compliance*

Section 610.114, F.S., provides that if a court finds a certificateholder to be in noncompliance with any requirements of ch. 610, F.S., the certificateholder shall have a reasonable amount of time, as specified by the court, to cure such noncompliance.

### *Reports to the Legislature*

Section 610.115, F.S., provides that by December 1, 2009, the Office of Program Policy Analysis and Governmental Accountability (OPPAGA) is to submit a report to the President of the Senate, Speaker of the House of Representatives, and the majority and minority leaders of the Senate and the House of Representatives on the status of competition in the cable service industry. This report shall include, by municipality and county, the number of cable service providers, the number of cable subscribers served, and the number of areas served by fewer than two cable service providers. The report is to

also include the trend in cable prices, and the identification of any patterns of service as they impact demographic and income groups.

#### Severability

Section 610.116, F.S., provides that if any provision of ch. 610, F.S., or its application to any person or circumstance is held invalid, such invalidity shall not affect other provisions or applications of ch. 610, F.S., that can be given effect without the invalid provision or application, and the provisions of ch. 610, F.S., are severable.

#### Communications Services Tax

The bill amends the CST provisions in ss. 202.24 (a) and (c), F.S., to conform to the provisions of the bill. Municipalities and counties are prohibited from negotiating the terms and conditions related to franchise fees, the definition of gross revenues, or other definitions or methodologies related to the payment of franchise fees on providers of cable services.

Additionally, the provision relating to in-kind contributions only applies to cable ordinances or franchise agreements that are in effect prior to July 1, 2006.

#### Use of Right-of-Way

The bill amends s. 337.401(3), F.S., relating to the use of the right-of-way to conform to the provisions of the bill. Section 337.401(3)(a)2., F.S., is repealed. This section related to the awarding of cable franchises by municipalities and counties.

Section 337.4061, F.S., is amended to make conforming changes, including definitions.

#### Repeal of s. 166.046, F.S.

The bill repeals s. 166.046, F.S., which is the current cable service franchise law that provided minimum standards for cable television franchises imposed upon municipalities and counties.

#### Conforming Statutes

Sections 358.81(3)(a) and 364.0361, F.S., are amended to conform to other statutory changes.

#### Effective Date

This act shall take effect July 1, 2006.

### C. SECTION DIRECTORY:

- |                   |  |
|-------------------|--|
| <u>Section 1.</u> | Provides a short title.  |
| <u>Section 2.</u> | Amends ss. 202.24(a) and (c), F.S., relating to limitations of local taxes and fees imposed on dealers of communications services.     |
| <u>Section 3.</u> | Amends ss. 337.401(3)(a), (e), and (f), F.S., relating to use of right-of-way for utilities subject to regulation; permit; fees.       |
| <u>Section 4.</u> | Amends s. 337.4061, F.S., relating to definitions; unlawful use of state-maintained road right-of-way by nonfranchised cable services. |

- Section 5. Creates ss. 610.102, 610.103, 610.104, 610.105, 610.106, 610.107, 610.108, 610.109, 610.110, 610.112, 610.113, 610.114, 610.115, and 610.116, F.S., establishing a statewide cable franchise authority.
- Section 6. Repeals s. 166.046, F.S., relating to cable television franchises.
- Section 7. Amends s. 350.81(3)(a), F.S., relating to communications services offered by governmental entities.
- Section 8. Amends s. 364.0361, F.S., relating to local government authority; nondiscriminatory exercise.
- Section 9. Provides that this act shall take effect July 1, 2006.

## II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

### A. FISCAL IMPACT ON STATE GOVERNMENT:

#### 1. Revenues:

The bill allows DOS to impose an application fee of up to \$10,000 for each application for a state-issued cable franchise, and an annual fee based on subscribership of up to \$10,000. However, it is unknown how many franchise applications will be filed.

#### 2. Expenditures:

According to DOS, its estimated first-year operating cost would be \$850,116, with \$83,888 of that being non-recurring costs. This estimate is based on establishing a new filing section within the Division of Corporations with 16 full-time equivalent positions. These figures apply if DOS' function is ministerial in nature. DOS may incur additional expenditures if it is required to litigate the denial of any certificate or establish rules to implement this law.

According to DACS, based on information received from several municipalities and counties, it estimates that it will receive between 350,000 and 700,000 calls annually related to cable service. DACS also anticipates that it will receive an addition 60,000 written complaints. In order to address these complaints, it will need 30 additional positions at the following recurring costs:

	<u>FY 2006-2007</u>	<u>FY 2007-2008</u>	<u>FY 2008-2009</u>
Recurring Operating Costs	\$1,284,642	\$1,753,685	\$1,785,149
Non-Recurring Operating Costs	\$547,586	\$0	\$0
Non-Operating Costs	<u>\$87,484</u>	<u>\$119,902</u>	<u>\$119,902</u>
Total	<u>\$1,919,712</u>	<u>\$1,873,587</u>	<u>\$1,785,149</u>

In addition DACS will need additional positions in 2009-2010, when it takes over the complaint function from municipalities and counties that have staff dedicated to handling cable television complaints.

### B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

#### 1. Revenues:

The Revenue Estimating Conference has estimated that, over time, this bill will have a statewide indeterminate fiscal impact in local governments of at least \$30.0 million, with the potential to be significantly higher.

2. Expenditures:

According to local governments, they could potentially lose tens of millions of dollars in capital grants, facilities, and services that cable operators currently provide under franchise agreements. Federal law allows local governments to negotiate numerous benefits from cable operators, including PEG channels provided at no charge, free installation and service to government buildings, free or advantageously priced institutional networks and capital grants. While these benefits are permitted by federal law, the bill would eliminate them. While the bill would eliminate a local government's right to negotiate for these services, it does not eliminate the need for these services, and the local government will need to find the funds to pay for these services.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

Instead of obtaining a cable franchise from each municipality or county where it wishes to provide service, an entity wishing to provide cable service will only need to obtain a state-issued certificate of franchise authority. This one-stop franchise process could potentially save applicants thousands of dollars.

D. FISCAL COMMENTS:

None.

### III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

This bill reduces the authority that cities and counties have to raise revenues in the aggregate by preempting the authority of cities and counties to negotiate franchise agreements. The Revenue Estimating Conference has estimated that the provisions of this bill will reduce, over time, the amount of revenues received by cities and counties by an amount in excess of \$30.0 million annually. No exemptions apply. Therefore, the bill may be a mandate requiring a two-thirds vote of the membership of each house.

2. Other:

**Impairment of Contracts**

The bill allows cable operators to unilaterally terminate their franchise agreements with municipalities and counties if certain conditions are met. These provisions may be an unconstitutional impairment of contracts under the United States and Florida Constitutions. Staff was provided much of the following legal information by the proponents and the opponents of the bill.

**Local Government Authority to Establish Franchises**

Among the things to consider in determining whether or not provisions in the bill constitute an unconstitutional impairment of contracts is where municipalities and counties receive their authority from to issue cable franchises.

An argument was raised that since the state gave the local governments the authority to grant cable franchises, the state can take this authority away. The statutory definition of "franchising authority" is "any governmental entity empowered by federal, state, or local law to grant a franchise" (see ss. 166.046 and 337.4061, F.S.). While s. 166.046(2), F.S., requires a public hearing and certain things to be considered prior to municipalities and counties granting a cable television franchise, there is nothing in the statute that declares the municipalities and counties as the LFAs.

Moreover, another argument was made that municipalities and counties receive their franchising authority from federal law. Federal law generally prohibits cable operators from providing cable service without a franchise, 47 U.S.C. s. 541(b)(1).<sup>5</sup> However, nothing in federal or state law specifically declares that municipalities and counties are the franchising authority for the provision of cable service. Since neither the federal nor state governments have assumed the role of issuing cable franchises, it has fallen on the municipalities and counties to become the LFAs.

### Local Government Standing to Challenge State Statute

Another question raised is whether or not the municipalities and counties would have standing to challenge the constitutionality of a state statute.

The argument was raised that case law well establishes that subordinates of a state do not have standing to challenge a state's action under the federal contacts clauses contained in Article I, Section 10 of the United States Constitution. See *Williams v. Mayor of Baltimore*, 289 U.S. 36, 40 (1933), and *American Association of People with Disabilities v. Shelley*, 324 F. Supp. 2d 1120, 1131 (C.D. Cal. 2004). Additional information was provided and it appears a federal appeals court was "unable to find a single federal case *holding* that a city cannot sue its parent state for impairing a contract between the city and a third party." See *City of Charleston v. Public Service Commission of West Virginia*, 57 F.3d 385, 389-390 (4<sup>th</sup> Cir. 1995) (emphasis in original).

It appears that the Florida Supreme Court has never addressed the issue of whether or not a city or county can challenge the constitutionality of a state statute.<sup>6</sup> Lower state courts have ruled that "[s]tate officers and agencies must presume legislation affecting their duties to be valid and *do not have standing to initiate litigation for the purpose of determining otherwise*. *Florida Department of Agriculture and Consumer Services v. Miami-Dade County*, 790 So.2d 555, 558 (Fla. 3d DCA 2001), quoting *Department of Education v. Lewis*, 416 So.2d 455, 458 (Fla. 1982). However, a state agency or officer may defensively raise the constitutionality of a statute if litigation is brought against it. *Department of Education v. Lewis*, 416 So.2d 455, 458 (Fla. 1982). There also appears to be an exception if the law being challenged involves the disbursement of public funds. *Fuchs v. Robbins*, 818 So.2d 460, 464 (Fla. 2002).

### Contract Impairment

Concern was raised that instead of challenging the constitutionality of the bill, a municipality or county is more likely to sue a franchisee who terminates its franchise under the provisions of this statute for breach of contract. While the franchisee would argue that this new statute allows it to terminate its franchise agreement with the municipality or county, the municipality or county would argue that the statute is an unconstitutional impairment of contracts.

Concerning the impairment of contracts, the Florida Supreme Court has determined that "[a]ny conduct on the part of the legislature that detracts in any way from the value of a contract is

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<sup>5</sup> There is an exception for persons lawfully providing cable service without a franchise prior to July 1, 1984, unless required to do so by the franchising authority.

<sup>6</sup> When the question of whether or not a county would have standing to challenge the constitutionality of a state statute was certified to the Florida Supreme Court in 1995, the case was resolved on another issue and the court did not address the certified question. *Santa Rosa County v. Administration Commission, Division of Administrative Hearings*, 661 So.2d 1190 (Fla. 1995).

inhibited by the Constitution.” See *Dewberry v. Auto-Owners Insurance Company*, 363 So.2d 1077, 1080 (Fla. 1978). Florida courts have also established that “[v]irtually no degree of contract impairment has been tolerated in this state.” *Yamaha Parts Distributors, Inc. v. Ehrman*, 316 So. 2d. 557, 559 (Fla. 1975). In determining how much impairment it is willing to tolerate, the Florida Supreme Court has stated:

[W]e must weigh the degree to which a party’s contract rights are statutorily impaired against both the source of authority under which the state purports to alter the contractual relationship and the evil which it seeks to remedy. Obviously, this becomes a balancing process to determine whether the nature and extent of the impairment is constitutionally tolerable in light of the importance of the state’s objective, or whether it unreasonably intrudes into the parties’ bargain to a degree that is necessary to achieve that objective. *Pomponio v. Claridge of Pompano Condominium, Inc.* 378 So.2d 774, 780 (Fla. 1979).

While the cases above, were based on contracts between private parties, there is some case law concerning the Legislature’s authority to impair the state’s own contracts. The Florida Supreme Court has ruled that the Legislature once accepted and funded a collective bargaining agreement, “the state and all its organs are bound by that agreement under the principles of contract law.” *Chiles v. United Faculty of Florida*, 615 So.2d 671, 673 (Fla. 1993). In this case, after ratifying the collective bargaining agreement in response to a fiscal emergency, the Legislature postponed, then terminated a scheduled pay-raise. The Supreme Court determined that while the Legislature has the authority to reduce an appropriation related to a collective bargaining agreement, it can only do so when it demonstrates a compelling state interest. However, before exercising this authority:

[T]he legislature must demonstrate that no other reasonable alternative means of preserving its contract with public workers, either in whole or in part. The mere fact that it is politically more expedient to eliminate all or part of the contracted funds is not in itself a compelling reason. Rather, the legislature must demonstrate that funds are from no other possible reasonable source. *Chiles at 673.*

In the *Chiles* case, the state interest of the Legislature trying to remedy a \$700 million budget shortfall, the Supreme Court determined that the budget shortfall was not sufficient reason for the state to impair the collective bargaining agreement.

If the courts have ruled that both a compelling state interest and no other remedy are required elements before the Legislature can impair the state’s contracts, it could be argued that both elements are required before the Legislature and could impair the contract of a municipality or county.

### **Home Rule**

Article VIII of the Florida Constitution gives municipalities and counties broad “home rule” power, which gives them the authority to enact an ordinance for any public purpose; however, state law prevails when there is a conflict between state law and local law.

Under home rule powers, municipalities and counties have established cable ordinances. These ordinances address the specific needs of the community including demographics, buildout, specific needs for PEG channels, safety and customer services issues.

With the proposed legislation, the bill would remove a municipality or county’s authority over cable service, including ordinances and cable franchise provisions that address the specific needs of the community.

**B. RULE-MAKING AUTHORITY:**

Rulemaking authority is granted to DOS to implement the provisions of issuing state-issued certificates of franchise authority. Rulemaking authority is also granted to DACS to adopt procedural rules relating to the provisions of the bill.

**C. DRAFTING ISSUES OR OTHER COMMENTS:**

Comments

It is unclear whether DOS will need enforcement authority, such as the ability to revoke certificates.

DOS has also raised the concern about whether it will be able to implement to provisions of this bill by July 1, 2006, especially if it is required to apply the federal cable regulations (47 U.S.C. s. 541 et, seq.).

Concern was raised about perpetual noncompliance. Section 610.114, F.S., provides that once a court determines that a certificateholder is not in compliance with the chapter's requirements, the certificateholder has a reasonable period of time to cure the noncompliance. However, there is no additional enforcement mechanism if the certificateholder continues to be in noncompliance.

The bill does not provide an appropriation to DOS for the administration of the act; however it does allow DOS to charge an application fee. There is also no appropriation to DACS for additional staffing to handle complaints concerning cable television.

While the bill allows municipalities and counties who currently have offices or departments dedicated to cable service quality complaints to continue handling those complaints until July 1, 2009, the bill is silent as to whether DACS is to handle complaints from municipalities and counties who do not have offices or departments dedicated to that function.

**IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES**

On March 30, 2006, the Utilities & Telecommunications Committee adopted six amendments. The amendments did the following:

- Revised the threshold for when an incumbent cable service provider can obtain a state-issued franchise. The original bill required cable service provider, other than the incumbent, to obtain a state-issued cable franchise for a service area that covers at least 50 percent of the households in the franchise area. The amendment required another cable service provider, other than the incumbent, to obtain a state-issued cable franchise in area located in whole or in part of the franchise area of the incumbent cable service provider;
- Provided for a transition period from July 1, 2006 to July 1, 2009, for municipalities and counties that have offices which handle cable service complaints to transfer this function to DACS;
- Required OPPAGA to submit a report to the Legislature on the status of competition in the cable industry by December 31, 2009;
- Allowed DOS to adopt procedural rules necessary to implement the act. DOS may also establish a standard application form, and impose an application fee not to exceed \$150;
- Required DACS to expeditiously address customer service complaints, and required DACS to adopt procedural rules to implement this requirement; and
- Required DACS to adopt procedural rules to implement the section related to discrimination.

The bill was then reported favorably with a committee substitute.

On April 11, 2006, the Finance and Tax Committee adopted eight amendments to the bill. The amendments made the following revisions to the bill:

- Required certificateholders to make cable service available at certain public buildings under certain circumstances;
- Clarified the certificateholder's obligations;
- Provides that for a period of two years, new certificateholders must pay the municipality or county one percent of the certificateholders' monthly revenues from the retail sale of cable services. After the two-year period, the certificateholder must pay the municipality or county up to one percent of revenues, but only if the municipality or county affirmatively approves such continued payment. These payments are to be used to construct and operate PEG channels;
- Affirmed a municipality's or county's authority over the use of public rights-of-way under its jurisdiction;
- Removed language about applicability to other laws, specifically as it relates to the right of a provider of video programming that is not a cable service provider;
- Increased the number of days DOS has to process applications from 15 to 30 days. Also, provided that prior to the 30 days, an applicant may request an automatic 30-day extension or proceed to challenge the denial; and
- Provided an increase in the maximum fee to be established by DOS from \$150 to \$10,000. Also, provided that in addition to the application fee, each certificateholder shall pay an annual fee established by DOS based on the number of the certificateholder's subscribers, not to exceed \$10,000. The fees shall be based on the costs incurred by the department in performing its duties under the provisions of this act.

The bill was then reported favorably with a committee substitute, and this analysis reflects the changes contained in the amendments adopted by the Finance and Tax Committee.



HB 1199 CS

2006  
CS

CHAMBER ACTION

The Finance & Tax Committee recommends the following:

**Council/Committee Substitute**

Remove the entire bill and insert:

A bill to be entitled

An act relating to statewide cable television franchises; providing a short title; amending s. 202.24, F.S.; prohibiting counties and municipalities from negotiating terms and conditions relating to cable services; deleting authorization to negotiate; revising application to existing ordinances or franchise agreements; amending s. 337.401, F.S.; deleting authorization for counties and municipalities to award cable service franchises and a restriction that cable service companies not operate without such a franchise; amending s. 337.4061, F.S.; revising definitions; creating ss. 610.102, 610.103, 610.104, 610.105, 610.106, 610.107, 610.108, 610.109, 610.110, 610.112, 610.113, 610.114, 610.115, and 610.116, F.S.; designating the Department of State as the authorizing authority; providing definitions; requiring state authorization to provide cable services; providing duties and responsibilities of the Department of State; providing application procedures and requirements;

HB 1199 CS

2006  
CS

24 | providing for issuing certificates of franchise authority;  
25 | providing eligibility requirements and criteria for a  
26 | certificate; authorizing the department to adopt rules;  
27 | providing for an application form; providing for fees;  
28 | prohibiting the department from imposing taxes, fees, or  
29 | charges on a cable service provider to issue a  
30 | certificate; prohibiting imposing buildout requirements on  
31 | a certificateholder; requiring certificateholders to make  
32 | cable service available at certain public buildings under  
33 | certain circumstances; imposing certain customer service  
34 | requirements on cable service providers; requiring the  
35 | Department of Agriculture and Consumer Services to receive  
36 | customer service complaints; requiring provision of  
37 | public, educational, and governmental access channels or  
38 | capacity equivalent; providing criteria, requirements, and  
39 | procedures; providing exceptions; providing  
40 | responsibilities of municipalities and counties relating  
41 | to such channels; providing for enforcement; requiring  
42 | certificateholders to pay a portion of certain monthly  
43 | revenues to municipalities or counties for a certain  
44 | period of time; providing for continuing such payments  
45 | pursuant to local government approval; authorizing  
46 | continued payments to be itemized; providing criteria for  
47 | such payments; providing requirements for and limitations  
48 | on counties and municipalities relating to access to  
49 | public right-of-way; prohibiting counties and  
50 | municipalities from imposing additional requirements on  
51 | certificateholders; authorizing counties and

HB 1199 CS

2006  
CS

municipalities to require permits of certificateholders relating to public right-of-way; providing permit criteria and requirements; prohibiting discrimination between cable service subscribers; providing for enforcement; providing for determinations of violations; providing for enforcement of compliance by certificateholders; requiring the Office of Program Policy Analysis and Government Accountability to report to the Legislature on the status of competition in the cable service industry; providing report requirements; providing severability; repealing s. 166.046, F.S., relating to definitions and minimum standards for cable television franchises imposed upon counties and municipalities; amending ss. 350.81 and 364.0361, F.S.; removing cross-references to conform; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. This act may be cited as the "Consumer Choice Act of 2006."

Section 2. Paragraphs (a) and (c) of subsection (2) of section 202.24, Florida Statutes, are amended to read:

202.24 Limitations on local taxes and fees imposed on dealers of communications services.--

(2)(a) Except as provided in paragraph (c), each public body is prohibited from:

1. Levying on or collecting from dealers or purchasers of communications services any tax, charge, fee, or other

HB 1199 CS

2006  
CS

imposition on or with respect to the provision or purchase of communications services.

2. Requiring any dealer of communications services to enter into or extend the term of a franchise or other agreement that requires the payment of a tax, charge, fee, or other imposition.

3. Adopting or enforcing any provision of any ordinance or agreement to the extent that such provision obligates a dealer of communications services to charge, collect, or pay to the public body a tax, charge, fee, or other imposition.

Municipalities and counties may not negotiate ~~Each municipality and county retains authority to negotiate all terms and conditions of a cable service franchise allowed by federal and state law except those terms and conditions related to franchise fees or and the definition of gross revenues or other definitions or methodologies related to the payment or assessment of franchise fees on providers of cable services.~~

(c) This subsection does not apply to:

1. Local communications services taxes levied under this chapter.

2. Ad valorem taxes levied pursuant to chapter 200.

3. Occupational license taxes levied under chapter 205.

4. "911" service charges levied under chapter 365.

5. Amounts charged for the rental or other use of property owned by a public body which is not in the public rights-of-way to a dealer of communications services for any purpose,

HB 1199 CS

2006  
CS

including, but not limited to, the placement or attachment of equipment used in the provision of communications services.

6. Permit fees of general applicability which are not related to placing or maintaining facilities in or on public roads or rights-of-way.

7. Permit fees related to placing or maintaining facilities in or on public roads or rights-of-way pursuant to s. 337.401.

8. Any in-kind requirements, institutional networks, or contributions for, or in support of, the use or construction of public, educational, or governmental access facilities allowed under federal law and imposed on providers of cable service pursuant to any existing ordinance or an existing franchise agreement granted by each municipality or county, under which ordinance or franchise agreement service is provided prior to July 1, 2006. Nothing in this subparagraph shall prohibit the ability of providers of cable service to recover such expenses as allowed under federal law.

9. Special assessments and impact fees.

10. Pole attachment fees that are charged by a local government for attachments to utility poles owned by the local government.

11. Utility service fees or other similar user fees for utility services.

12. Any other generally applicable tax, fee, charge, or imposition authorized by general law on July 1, 2000, which is not specifically prohibited by this subsection or included as a replaced revenue source in s. 202.20.

HB 1199 CS

2006  
CS

135       Section 3. Paragraphs (a), (e), and (f) of subsection (3)  
136 of section 337.401, Florida Statutes, are amended to read:  
137       337.401 Use of right-of-way for utilities subject to  
138 regulation; permit; fees.--  
139       (3)(a)~~1~~. Because of the unique circumstances applicable to  
140 providers of communications services, including, but not limited  
141 to, the circumstances described in paragraph (e) and the fact  
142 that federal and state law require the nondiscriminatory  
143 treatment of providers of telecommunications services, and  
144 because of the desire to promote competition among providers of  
145 communications services, it is the intent of the Legislature  
146 that municipalities and counties treat providers of  
147 communications services in a nondiscriminatory and competitively  
148 neutral manner when imposing rules or regulations governing the  
149 placement or maintenance of communications facilities in the  
150 public roads or rights-of-way. Rules or regulations imposed by a  
151 municipality or county relating to providers of communications  
152 services placing or maintaining communications facilities in its  
153 roads or rights-of-way must be generally applicable to all  
154 providers of communications services and, notwithstanding any  
155 other law, may not require a provider of communications  
156 services, ~~except as otherwise provided in subparagraph 2.,~~ to  
157 apply for or enter into an individual license, franchise, or  
158 other agreement with the municipality or county as a condition  
159 of placing or maintaining communications facilities in its roads  
160 or rights-of-way. In addition to other reasonable rules or  
161 regulations that a municipality or county may adopt relating to  
162 the placement or maintenance of communications facilities in its

HB 1199 CS

2006  
CS

163 roads or rights-of-way under this subsection, a municipality or  
164 county may require a provider of communications services that  
165 places or seeks to place facilities in its roads or rights-of-  
166 way to register with the municipality or county and to provide  
167 the name of the registrant; the name, address, and telephone  
168 number of a contact person for the registrant; the number of the  
169 registrant's current certificate of authorization issued by the  
170 Florida Public Service Commission, or the Federal Communications  
171 Commission, or the Florida Department of State; and proof of  
172 insurance or self-insuring status adequate to defend and cover  
173 claims.

174       ~~2. Notwithstanding the provisions of subparagraph 1., a~~  
175 ~~municipality or county may, as provided by 47 U.S.C. s. 541,~~  
176 ~~award one or more franchises within its jurisdiction for the~~  
177 ~~provision of cable service, and a provider of cable service~~  
178 ~~shall not provide cable service without such franchise. Each~~  
179 ~~municipality and county retains authority to negotiate all terms~~  
180 ~~and conditions of a cable service franchise allowed by federal~~  
181 ~~law and s. 166.046, except those terms and conditions related to~~  
182 ~~franchise fees and the definition of gross revenues or other~~  
183 ~~definitions or methodologies related to the payment or~~  
184 ~~assessment of franchise fees and permit fees as provided in~~  
185 ~~paragraph (c) on providers of cable services. A municipality or~~  
186 ~~county may exercise its right to require from providers of cable~~  
187 ~~service in-kind requirements, including, but not limited to,~~  
188 ~~institutional networks, and contributions for, or in support of,~~  
189 ~~the use or construction of public, educational, or governmental~~  
190 ~~access facilities to the extent permitted by federal law. A~~

Page 7 of 30

CODING: Words stricken are deletions; words underlined are additions.

hb1199-02-c2

HB 1199 CS

2006  
CS

191 ~~provider of cable service may exercise its right to recover any~~  
192 ~~such expenses associated with such in-kind requirements, to the~~  
193 ~~extent permitted by federal law.~~

194       (e) The authority of municipalities and counties to  
195 require franchise fees from providers of communications  
196 services, with respect to the provision of communications  
197 services, is specifically preempted by the state, ~~except as~~  
198 ~~otherwise provided in subparagraph (a)2.,~~ because of unique  
199 circumstances applicable to providers of communications services  
200 when compared to other utilities occupying municipal or county  
201 roads or rights-of-way. Providers of communications services may  
202 provide similar services in a manner that requires the placement  
203 of facilities in municipal or county roads or rights-of-way or  
204 in a manner that does not require the placement of facilities in  
205 such roads or rights-of-way. Although similar communications  
206 services may be provided by different means, the state desires  
207 to treat providers of communications services in a  
208 nondiscriminatory manner and to have the taxes, franchise fees,  
209 and other fees paid by providers of communications services be  
210 competitively neutral. Municipalities and counties retain all  
211 existing authority, if any, to collect franchise fees from users  
212 or occupants of municipal or county roads or rights-of-way other  
213 than providers of communications services, and the provisions of  
214 this subsection shall have no effect upon this authority. The  
215 provisions of this subsection do not restrict the authority, if  
216 any, of municipalities or counties or other governmental  
217 entities to receive reasonable rental fees based on fair market  
218 value for the use of public lands and buildings on property



HB 1199 CS

2006  
CS

219 outside the public roads or rights-of-way for the placement of  
220 communications antennas and towers.

221 (f) Except as expressly allowed or authorized by general  
222 law and except for the rights-of-way permit fees subject to  
223 paragraph (c), a municipality or county may not levy on a  
224 provider of communications services a tax, fee, or other charge  
225 or imposition for operating as a provider of communications  
226 services within the jurisdiction of the municipality or county  
227 which is in any way related to using its roads or rights-of-way.  
228 A municipality or county may not require or solicit in-kind  
229 compensation, except as otherwise provided in s. 202.24(2)(c)8.  
230 or s. 610.109 subparagraph (a)2. Nothing in this paragraph shall  
231 impair any ordinance or agreement in effect on May 22, 1998, or  
232 any voluntary agreement entered into subsequent to that date,  
233 which provides for or allows in-kind compensation by a  
234 telecommunications company.

235 Section 4. Section 337.4061, Florida Statutes, is amended  
236 to read:

237 337.4061 Definitions; unlawful use of state-maintained  
238 road right-of-way by nonfranchised cable television services.--

239 (1) As used in this section, the term:

240 (a) "Cable service" means:

241 1. The one-way transmission to subscribers of video  
242 programming or any other programming service; and

243 2. Subscriber interaction, if any, which is required for  
244 the selection of such video programming or other programming  
245 service.

HB 1199 CS

2006  
CS

(b) "Cable system" means a facility, consisting of a set of closed transmission paths and associated signal generation, reception, and control equipment that is designed to provide cable service which includes video programming and which is provided to multiple subscribers within a community, but such term does not include:

1. A facility that serves only to retransmit the television signals of one or more television broadcast stations;

2. A facility that serves only subscribers in one or more multiple-unit dwellings under common ownership, control, or management, unless such facility or facilities use any public right-of-way;

3. A facility that serves subscribers without using any public right-of-way;

4.3- A facility of a common carrier that is subject, in whole or in part, to the provisions of 47 U.S.C. s. 201 et seq., except the specific bandwidths or wavelengths used by that such facility shall be considered a cable system only to the extent such bandwidths or wavelengths are faeility is used in the transmission of video programming directly to subscribers, unless the extent of such use is solely to provide interactive on-demand services, in which case the use of such bandwidths or wavelengths is not a cable system; or

5.4- Any facilities of any electric utility used solely for operating its electric utility systems.

(c) "Franchise" means an initial authorization or renewal thereof issued by a franchising authority, whether such authorization is designated as a franchise, permit, license,

HB 1199 CS

2006  
CS

resolution, contract, certificate, agreement, or otherwise,  
which authorizes the construction or operation of a cable  
system.

(d) "Franchising authority" means any governmental entity  
empowered by federal, state, or local law to grant a franchise.

(e) "Person" means an individual, partnership,  
association, joint stock company, trust, corporation, or  
governmental entity.

(f) "Video programming" means programming provided by or  
generally considered comparable to programming provided by a  
television broadcast station or cable system.

(2) It is unlawful to use the right-of-way of any state-  
maintained road, including appendages thereto, and also  
including, but not limited to, rest areas, wayside parks, boat-  
launching ramps, weigh stations, and scenic easements, to  
provide for cable service over a cable system purposes within a  
geographic area subject to a valid existing franchise for cable  
service, unless the cable system using such right-of-way holds a  
franchise from a franchise authority ~~the municipality or county~~  
for the area in which the right-of-way is located.

(3) A violation of this section shall be deemed a  
violation of s. 337.406.

Section 5. Sections 610.102, 610.103, 610.104, 610.105,  
610.106, 610.107, 610.108, 610.109, 610.110, 610.112, 610.113,  
610.114, 610.115, and 610.116, Florida Statutes, are created to  
read:

610.102 Department of State authority to issue statewide  
cable franchise.--The department shall be designated as the

HB 1199 CS

2006  
CS

302 franchising authority, pursuant to 47 U.S.C. s. 522(10), for a  
303 state-issued franchise for the provision of cable service. A  
304 municipality or county may not grant a new franchise for the  
305 provision of cable service within its jurisdiction.

306 610.103 Definitions.--As used in ss. 610.102-610.114:

307 (1) "Cable service" means:

308 (a) The one-way transmission to subscribers of video  
309 programming or any other programming service.

310 (b) Subscriber interaction, if any, that is required for  
311 the selection of such video programming or other programming  
312 service.

313 (2) "Cable system" means a facility consisting of a set of  
314 closed transmission paths and associated signal generation,  
315 reception, and control equipment that is designed to provide  
316 cable service that includes video programming and that is  
317 provided to multiple subscribers within a community, but such  
318 term does not include:

319 (a) A facility that serves only to retransmit the  
320 television signals of one or more television broadcast stations;

321 (b) A facility that serves only subscribers in one or more  
322 multiple-unit dwellings under common ownership, control, or  
323 management, unless such facility or facilities use any public  
324 right-of-way;

325 (c) A facility that serves subscribers without using any  
326 public right-of-way;

327 (d) A facility of a common carrier that is subject, in  
328 whole or in part, to the provisions of 47 U.S.C. s. 201 et seq.,  
329 except the specific bandwidths or wavelengths over such facility

HB 1199 CS

2006  
CS

330 shall be considered a cable system only to the extent such  
331 bandwidths or wavelengths are used in the transmission of video  
332 programming directly to subscribers, unless the extent of such  
333 use is solely to provide interactive on-demand services, in  
334 which case it is not a cable system; or

335 (e) Any facilities of any electric utility used solely for  
336 operating its electric utility systems.

337 (3) "Cable service provider" means a person that provides  
338 cable service over a cable system.

339 (4) "Certificateholder" means a cable service provider  
340 that has been issued and holds a certificate of franchise  
341 authority from the department.

342 (5) "Department" means the Department of State.

343 (6) "Franchise" means an initial authorization or renewal  
344 of an authorization, regardless of whether the authorization is  
345 designated as a franchise, permit, license, resolution,  
346 contract, certificate, agreement, or otherwise, to construct and  
347 operate a cable system in the public right-of-way.

348 (7) "Franchise authority" means any governmental entity  
349 empowered by federal, state, or local law to grant a franchise.

350 (8) "Incumbent cable service provider" means the cable  
351 service provider serving the largest number of cable subscribers  
352 in a particular municipal or county franchise area on July 1,  
353 2006.

354 (9) "Public right-of-way" means the area on, below, or  
355 above a public roadway, highway, street, sidewalk, alley, or  
356 waterway, including, without limitation, a municipal, county,

HB 1199 CS

2006  
CS

state, district, or other public roadway, highway, street,  
sidewalk, alley, or waterway.

(10) "Video programming" means programming provided by, or  
generally considered comparable to programming provided by, a  
television broadcast station as set forth in 47 U.S.C. s.  
522(20).

610.104 State authorization to provide cable service.--

(1) An entity or person seeking to provide cable service  
over a cable system in this state after July 1, 2006, shall file  
an application for a state-issued certificate of franchise  
authority with the department as required by this section. An  
entity providing cable service under an unexpired franchise  
agreement with a municipality or county as of July 1, 2006, is  
not subject to this subsection with respect to such municipality  
or county until the franchise agreement expires, except as  
provided by subsection (2) and s. 610.105(4). An entity  
providing cable service may seek authorization from the  
department to provide service in areas where the entity  
currently does not have an existing franchise agreement as of  
July 1, 2006.

(2) Beginning 90 days after July 1, 2006, a cable service  
provider that is not an incumbent cable service provider and  
provides cable service to less than 40 percent of the total  
cable service subscribers in a particular franchise area may  
elect to terminate an existing municipal or county franchise and  
seek a state-issued certificate of franchise authority by  
providing written notice to the Secretary of State and the  
affected municipality or county not later than 180 days after

HB 1199 CS

2006  
CS

385 July 1, 2006. The municipal or county franchise is terminated on  
386 the date the department issues the state-issued certificate of  
387 franchise authority.

388 (3) Before the 10th business day after an applicant  
389 submits the affidavit, the department shall notify the applicant  
390 for a state-issued certificate of franchise authority whether  
391 the applicant's affidavit described by subsection (4) is  
392 complete. If the department denies the application, the  
393 department must specify with particularity the reasons for the  
394 denial and permit the applicant to amend the application to cure  
395 any deficiency. The department shall act upon such amended  
396 application within 5 business days.

397 (4) The department shall issue a certificate of franchise  
398 authority to offer cable service before the 15th business day  
399 after receipt of a completed affidavit submitted by an applicant  
400 and signed by an officer or general partner of the applicant  
401 affirming:

402 (a) That the applicant has filed or will timely file with  
403 the Federal Communications Commission all forms required by that  
404 agency in advance of offering cable service in this state.

405 (b) That the applicant agrees to comply with all  
406 applicable federal and state laws and regulations, to the extent  
407 that such state laws and rules are not in conflict with or  
408 superseded by the provisions of this chapter or other applicable  
409 state law.

410 (c) That the applicant agrees to comply with all lawful  
411 state laws and rules and municipal and county ordinances and  
412 regulations regarding the placement and maintenance of

HB 1199 CS

2006  
CS

413 communications facilities in the public right-of-way that are  
414 generally applicable to providers of communications services in  
415 accordance with s. 337.401.

416 (d) A description of the service area for which the  
417 applicant seeks certificate of franchise authority, which need  
418 not be coextensive with municipal, county, or other political  
419 boundaries.

420 (e) The location of the applicant's principal place of  
421 business and the names of the applicant's principal executive  
422 officers.

423 (5) If the department fails to act on the application  
424 within 30 business days after receiving the application, the  
425 application shall be denied. Prior to the expiration of the 30-  
426 day period, the applicant may request an automatic 30-day  
427 extension or may proceed to the remedies set forth in subsection  
428 (10).

429 (6) The certificate of franchise authority issued by the  
430 department shall contain:

431 (a) A grant of authority to provide cable service over a  
432 cable system as requested in the application.

433 (b) A grant of authority to construct, maintain, and  
434 operate facilities through, upon, over, and under any public  
435 right-of-way or waters.

436 (c) A statement that the grant of authority is subject to  
437 lawful operation of the cable system to provide cable service by  
438 the applicant or its successor in interest.

439 (7) A certificateholder that seeks to include additional  
440 service areas in its current certificate shall file notice with



HB 1199 CS

2006  
CS

the department that reflects the new service area or areas to be served.

(8) The certificate of franchise authority issued by the department is fully transferable to any successor in interest to the applicant to which the certificate is initially granted. A notice of transfer shall be filed with the department and the relevant municipality or county within 14 business days following the completion of such transfer.

(9) The certificate of franchise authority issued by the department may be terminated by the cable service provider by submitting notice to the department.

(10) An applicant may challenge a denial of an application by the department in a court of competent jurisdiction through a petition for mandamus.

(11) The department shall adopt any procedural rules pursuant to ss. 120.536(1) and 120.54 necessary to implement this section.

(12) The department may establish a standard application form, in which case the application shall be on such form and must be accompanied by a fee established by the department, not to exceed \$10,000. In addition to the application fee, each certificateholder shall pay an annual fee established by the department and based on the number of the certificateholder's subscribers, not to exceed \$10,000. The fees shall be based on the costs incurred by the department in performing its duties under the provisions of ss. 610.102-610.115.

610.105 Eligibility for state-issued franchise.--

HB 1199 CS

2006  
CS

(1) Except as provided in s. 610.104(1) and (2) and subsection (4), a cable service provider that has an existing, unexpired franchise to provide cable service with respect to a municipality or county as of July 1, 2006, is not eligible to seek a state-issued certificate of franchise authority under this chapter as to that municipality or county until the expiration date of the existing franchise agreement.

(2) For purposes of this section, a cable service provider will be deemed to have or have had a franchise to provide cable service in a specific municipality or county if any affiliate or successor entity of the cable service provider has or had a franchise agreement granted by that specific municipality or county.

(3) The term "affiliate or successor entity" in this section refers to an entity receiving, obtaining, or operating under a franchise that directly or indirectly owns or controls, is owned or controlled by, or is under common ownership or control with the cable service provider.

(4) Notwithstanding subsection (1), a cable service provider may elect to terminate an existing municipal or county franchise and seek a state-issued certificate of franchise authority with respect to such municipality or county if another cable service provider is granted a state-issued certificate of franchise authority located in whole or in part within the service area covered by the existing municipal or county franchise. The cable service provider may terminate its existing franchise under this subsection by providing written notice to the Secretary of State and the affected municipality or county

HB 1199 CS

2006  
CS

496 within 180 days following the issuance of the state-issued  
497 certificate of franchise authority to the nonincumbent cable  
498 service provider. The municipal or county franchise is  
499 terminated on the date the department issues the state-issued  
500 certificate of franchise authority with respect to such  
501 municipality or county to the cable service provider.

502 610.106 Franchise fee prohibited.--The department may not  
503 impose any taxes, fees, charges, or other impositions on a cable  
504 service provider as a condition for the issuance of a state-  
505 issued certificate of franchise authority. No municipality or  
506 county may impose any taxes, fees, charges, or other exactions  
507 on certificateholders in connection with use of public right-of-  
508 way as a condition of a certificateholder doing business in the  
509 municipality or county, or otherwise, except such taxes, fees,  
510 charges, or other exactions permitted by chapter 202 and s.  
511 337.401(6).

512 610.107 Buildout.--No franchising authority, state agency,  
513 or political subdivision may impose any buildout requirements on  
514 a certificateholder. However, each certificateholder, if  
515 requested pursuant to a bona fide order for cable service, shall  
516 make cable service available at each building used for municipal  
517 or county purposes, including, but not limited to, emergency  
518 operations centers, fire stations, and public schools, within  
519 the area described in its application under s. 610.104(4)(d)  
520 within 5 years after the date of the issuance of its certificate  
521 by the department using the technology of its choice.

522 610.108 Customer service standards.--

HB 1199 CS

2006  
CS

(1) An incumbent cable service provider shall comply with customer service requirements reasonably comparable to the standards in 47 C.F.R. s. 76.309(c) until there are two or more providers offering service, excluding direct-to-home satellite service, in the relevant service area.

(2) Beginning not later than July 1, 2009, for all providers of cable service in municipalities and counties that, as of January 1, 2006, have an office or department dedicated to responding to cable service quality complaints, all such complaints shall be handled by the Department of Agriculture and Consumer Services. Until that time, cable service quality complaints shall continue to be handled by the municipality or county. This provision shall not be construed to permit the municipality or county to impose customer service standards in conflict with this section.

(3) The Department of Agriculture and Consumer Services shall receive service quality complaints from customers of a certificateholder. The department shall address such complaints in an expeditious manner by assisting in the resolution of such complaint between the complainant and the certificateholder. The department shall adopt any procedural rules pursuant to ss. 120.536(1) and 120.54 necessary to implement this section.

610.109 Public, educational, and governmental access channels.--

(1) A certificateholder, not later than 180 days following a request by a municipality or county within whose jurisdiction the certificateholder is providing cable service, shall designate a sufficient amount of capacity on its network to

HB 1199 CS

2006  
CS

551 allow the provision of public, educational, and governmental  
552 access channels for noncommercial programming as set forth in  
553 this section.

554 (2) A certificateholder shall designate a sufficient  
555 amount of capacity on its network to allow the provision of a  
556 comparable number of public, educational, and governmental  
557 access channels or capacity equivalent that a municipality or  
558 county has activated under the incumbent cable service  
559 provider's franchise agreement as of July 1, 2006. For the  
560 purposes of this section, a public, educational, or governmental  
561 channel is deemed activated if the channel is being used for  
562 public, educational, or governmental programming within the  
563 municipality for at least 10 hours per day. Except as provided  
564 in subsections (3)-(5), the certificateholder's obligations  
565 under this subsection continue regardless of whether the  
566 incumbent cable service provider, subsequent to July 1, 2006,  
567 becomes a certificateholder pursuant to this chapter.

568 (3) If a municipality or county did not have public,  
569 educational, or governmental access channels activated under the  
570 incumbent cable service provider's franchise agreement as of  
571 July 1, 2006, not later than 180 days following a request by the  
572 municipality or county within whose jurisdiction a  
573 certificateholder is providing cable service, the cable service  
574 provider shall furnish:

575 (a) Up to three public, educational, or governmental  
576 channels or capacity equivalent for a municipality or county  
577 with a population of at least 50,000.

HB 1199 CS

2006  
CS

578        (b) Up to two public, educational, or governmental  
579        channels or capacity equivalent for a municipality or county  
580        with a population of less than 50,000.

581        (4) Any public, educational, or governmental channel  
582        provided pursuant to this section that is not used by the  
583        municipality or county for at least 10 hours a day shall no  
584        longer be made available to the municipality or county but may  
585        be programmed at the cable service provider's discretion. At  
586        such time as the municipality or county can certify to the cable  
587        service provider a schedule for at least 10 hours of daily  
588        programming, the cable service provider shall restore the  
589        previously lost channel but shall be under no obligation to  
590        carry that channel on a basic or analog tier.

591        (5) If a municipality or county has not used the number of  
592        access channels or capacity equivalent permitted by subsection  
593        (3), access to the additional channels or capacity equivalent  
594        allowed in subsection (3) shall be provided upon 180 days'  
595        written notice if the municipality or county meets the following  
596        standard: if a municipality or county has one active public,  
597        educational, or governmental channel and wishes to activate an  
598        additional public, educational, or governmental channel, the  
599        initial channel shall be considered to be substantially used  
600        when 12 hours are programmed on that channel each calendar day.  
601        In addition, at least 40 percent of the 12 hours of programming  
602        for each business day on average over each calendar quarter must  
603        be nonrepeat programming. Nonrepeat programming shall include  
604        the first three videocastings of a program. If a municipality or  
605        county is entitled to three public, educational, or governmental

HB 1199 CS

2006  
CS

606 channels under subsection (3) and has in service two active  
607 public, educational, or governmental channels, each of the two  
608 active channels shall be considered to be substantially used  
609 when 12 hours are programmed on each channel each calendar day  
610 and at least 50 percent of the 12 hours of programming for each  
611 business day on average over each calendar quarter is nonrepeat  
612 programming for three consecutive calendar quarters.

613 (6) The operation of any public, educational, or  
614 governmental access channel or capacity equivalent provided  
615 under this section shall be the responsibility of the  
616 municipality or county receiving the benefit of such channel or  
617 capacity equivalent, and a certificateholder bears only the  
618 responsibility for the transmission of such channel content. A  
619 certificateholder shall be responsible for providing the  
620 connectivity to each public, educational, or governmental access  
621 channel distribution point up to the first 200 feet.

622 (7) The municipality or county shall ensure that all  
623 transmissions, content, or programming to be transmitted over a  
624 channel or facility by a certificateholder are provided or  
625 submitted to the cable service provider in a manner or form that  
626 is capable of being accepted and transmitted by a provider  
627 without any requirement for additional alteration or change in  
628 the content by the provider, over the particular network of the  
629 cable service provider, which is compatible with the technology  
630 or protocol utilized by the cable service provider to deliver  
631 services. The provision of public, educational, or governmental  
632 content to the provider constitutes authorization for the  
633 provider to carry such content, including, at the provider's

HB 1199 CS

2006  
CS

option, authorization to carry the content beyond the jurisdictional boundaries of the municipality or county.

(8) Where technically feasible, a certificateholder and an incumbent cable service provider shall use reasonable efforts to interconnect their cable systems for the purpose of providing public, educational, and governmental programming.

Interconnection may be accomplished by direct cable, microwave link, satellite, or other reasonable method of connection.

Certificateholders and incumbent cable service providers shall negotiate in good faith and incumbent cable service providers may not withhold interconnection of public, educational, and governmental channels.

(9) A certificateholder is not required to interconnect for, or otherwise to transmit, public, educational, and governmental content that is branded with the logo, name, or other identifying marks of another cable service provider, and a municipality or county may require a cable service provider to remove its logo, name, or other identifying marks from public, educational, and governmental content that is to be made available to another provider.

(10) A court of competent jurisdiction shall have exclusive jurisdiction to enforce any requirement under this section.

(11) In support of the capital costs incurred by the municipality or county in connection with the construction or operation of public, educational, or governmental access facilities and content provided by a municipality or county pursuant to this section, the certificateholder shall pay to the



HB 1199 CS

2006  
CS

662 municipality or county 1 percent of the certificateholder's  
663 monthly revenues from the retail sale of cable services provided  
664 to customers located within the respective municipal or county  
665 boundaries, based upon the certificateholder's books and  
666 records, for a period of 2 years after the date the department  
667 issues a certificate to the certificateholder. After the  
668 expiration of the 2-year period, the certificateholder shall pay  
669 and the municipality or county shall continue to receive up to 1  
670 percent of such revenues in support of the capital costs  
671 incurred by the municipality or county in connection with the  
672 construction or operation of public, educational, or  
673 governmental content provided by the municipality or county only  
674 if the governing body of the municipality or county  
675 affirmatively approves such continued payment. Upon such  
676 affirmative vote of approval, the certificateholder may recover  
677 from the customer its costs of the payment through a separately  
678 stated charge on the customer's bill. All payments made pursuant  
679 to this subsection shall be made in the same manner as, and  
680 treated as part of, the certificateholder's payment of  
681 communications services tax pursuant to s. 202.27, and all  
682 definitions, exemptions, and administrative provisions of  
683 chapter 202 shall apply to such payments.

684 610.110 Nondiscrimination by municipality or county.--

685 (1) A municipality or county shall allow a  
686 certificateholder to install, construct, and maintain a network  
687 within a public right-of-way and shall provide a  
688 certificateholder with open, comparable, nondiscriminatory, and  
689 competitively neutral access to the public right-of-way in

HB 1199 CS

2006  
CS

accordance with the provisions of s. 337.401. All use of a public right-of-way by a certificateholder is nonexclusive.

(2) A municipality or county may not discriminate against a certificateholder regarding:

(a) The authorization or placement of a network in a public right-of-way;

(b) Access to a building or other property; or

(c) Utility pole attachment terms.

(3) Except as expressly provided in this section, nothing in this chapter shall be construed to limit or abrogate a municipality's or county's authority over the use of public rights-of-way under its jurisdiction, as provided in s. 337.401(3) (a).

610.112 Limitation on local authority.--

(1) A municipality or county may not impose additional requirements on a certificateholder, including, but not limited to, financial, operational, and administrative requirements, except as expressly permitted by this chapter. A municipality or county may not impose on activities of a certificateholder a requirement:

(a) That particular business offices be located in the municipality or county;

(b) Regarding the filing of reports and documents with the municipality or county that are not required by state or federal law and that are not related to the use of the public right-of-way. Reports and documents other than schematics indicating the location of facilities for a specific site that are provided in the normal course of the municipality's or county's permitting

HB 1199 CS

2006  
CS

718 process, that are authorized by s. 337.401 for communications  
719 services providers, or that are otherwise required in the normal  
720 course of such permitting process shall not be considered  
721 related to the use of the public right-of-way for communications  
722 services providers. A municipality or county may not request  
723 information concerning the capacity or technical configuration  
724 of a certificateholder's facilities;

725 (c) For the inspection of a certificateholder's business  
726 records; or

727 (d) For the approval of transfers of ownership or control  
728 of a certificateholder's business, except a municipality or  
729 county may require a certificateholder to provide notice of a  
730 transfer within a reasonable time.

731 (2) Notwithstanding any other provision of law, a  
732 municipality or county may require the issuance of a permit in  
733 accordance with and subject to s. 337.401 to a certificateholder  
734 that is placing and maintaining facilities in or on a public  
735 right-of-way in the municipality or county. In accordance with  
736 s. 337.402, the permit may require the permitholder to be  
737 responsible, at the permitholder's expense, for any damage  
738 resulting from the issuance of such permit and for restoring the  
739 public right-of-way to a substantially similar condition to that  
740 of the public right-of-way before installation of such  
741 facilities. The terms of the permit shall be consistent with  
742 construction permits issued to other providers of communications  
743 services placing or maintaining communications facilities in a  
744 public right-of-way.

745 610.113 Discrimination prohibited.--

Page 27 of 30

CODING: Words stricken are deletions; words underlined are additions.

hb1199-02-c2

HB 1199 CS

2006  
CS

(1) The purpose of this section is to prevent discrimination among potential residential subscribers.

(2) Pursuant to 47 U.S.C. s. 541(a)(3), a certificateholder may not deny access to service to any group of potential residential subscribers because of the income of the residents in the local area in which such group resides.

(3) An affected person may seek enforcement of the requirements provided by subsection (2) by initiating a proceeding with the Department of Agriculture and Consumer Services pursuant to s. 570.544.

(4) For purposes of determining whether a certificateholder has violated subsection (2), cost, density, distance, and technological or commercial limitations shall be taken into account, and the certificateholder shall have a reasonable time to deploy service pursuant to 47 U.S.C. s. 541(a)(4)(A). Use of an alternative technology that provides comparable content, service, and functionality may not be considered a violation of subsection (2). The inability to serve an end user because a certificateholder is prohibited from placing its own facilities in a building or property is not a violation of subsection (2). This section may not be construed to authorize any buildout requirements on a certificateholder.

(5) The Department of Agriculture and Consumer Services shall adopt any procedural rules pursuant to ss. 120.536(1) and 120.54 necessary to implement this section.

610.114 Compliance.--If a certificateholder is found by a court of competent jurisdiction to not comply with the requirements of this chapter, the certificateholder shall have a

HB 1199 CS

2006  
CS

774 reasonable period of time, as specified by the court, to cure  
775 such noncompliance.

776 610.115 Reports to the Legislature.--The Office of Program  
777 Policy Analysis and Governmental Accountability shall submit to  
778 the President of the Senate, the Speaker of the House of  
779 Representatives, and the majority and minority leaders of the  
780 Senate and House of Representatives, on December 1, 2009, a  
781 report on the status of competition in the cable service  
782 industry, including, by each municipality and county, the number  
783 of cable service providers, the number of cable subscribers  
784 served, the number of areas served by fewer than two cable  
785 service providers, the trend in cable prices, and the  
786 identification of any patterns of service as they impact  
787 demographic and income groups.

788 610.116 Severability.--If any provision of ss. 610.102-  
789 610.115 or the application thereof to any person or circumstance  
790 is held invalid, such invalidity shall not affect other  
791 provisions or application of ss. 610.102-610.115 that can be  
792 given effect without the invalid provision or application, and  
793 to this end the provisions of ss. 610.102-610.115 are severable.

794 Section 6. Section 166.046, Florida Statutes, is repealed.

795 Section 7. Paragraph (a) of subsection (3) of section  
796 350.81, Florida Statutes, is amended to read:

797 350.81 Communications services offered by governmental  
798 entities.--

799 (3)(a) A governmental entity that provides a cable service  
800 shall comply with the Cable Communications Policy Act of 1984,  
801 47 U.S.C. ss. 521 et seq., the regulations issued by the Federal

HB 1199 CS

2006  
CS

802 Communications Commission under the Cable Communications Policy  
803 Act of 1984, 47 U.S.C. ss. 521 et seq., and all applicable state  
804 and federal rules and regulations, including, but not limited  
805 to, ~~s. 166.046~~ and those provisions of chapters 202, 212, and  
806 337, and 610 which apply to a provider of the services.

807 Section 8. Section 364.0361, Florida Statutes, is amended  
808 to read:

809 364.0361 Local government authority; nondiscriminatory  
810 exercise.--A local government shall treat each  
811 telecommunications company in a nondiscriminatory manner when  
812 exercising its authority to grant franchises to a  
813 telecommunications company or to otherwise establish conditions  
814 or compensation for the use of rights-of-way or other public  
815 property by a telecommunications company. A local government may  
816 not directly or indirectly regulate the terms and conditions,  
817 including, but not limited to, the operating systems,  
818 qualifications, services, service quality, service territory,  
819 and prices, applicable to or in connection with the provision of  
820 any voice-over-Internet protocol, regardless of the platform,  
821 provider, or protocol, broadband or information service. This  
822 section does not relieve a provider from any obligations under  
823 ~~s. 166.046~~ or s. 337.401.

824 Section 9. This act shall take effect July 1, 2006.

HOUSE AMENDMENT FOR COUNCIL/COMMITTEE PURPOSES

1

Amendment No. (for drafter's use only)

Bill No. 1199

COUNCIL/COMMITTEE ACTION

ADOPTED \_\_\_\_\_ (Y/N)  
ADOPTED AS AMENDED \_\_\_\_\_ (Y/N)  
ADOPTED W/O OBJECTION \_\_\_\_\_ (Y/N)  
FAILED TO ADOPT \_\_\_\_\_ (Y/N)  
WITHDRAWN \_\_\_\_\_ (Y/N)  
OTHER \_\_\_\_\_

Council/Committee hearing bill: Commerce Council  
Representative(s) Traviesa offered the following:

**Amendment (with Title Amendment)**

Remove line(s) 423-466 and insert:

(f) That the applicant is authorized by the Department of  
State to transact business in the state.

(g) That the applicant has sufficient technical,  
financial, and managerial capability to provide cable service  
within the service area for which the applicant seeks a  
certificate of franchise authority. At the time of the filing of  
the affidavit, the applicant shall furnish its most recent  
unqualified audited financial statement if a publicly available  
audited financial report is not available.

(h) That neither the applicant nor any of its current  
principal executive officers are under indictment or have been  
convicted of a felony in this state.

(5) If the department fails to act on the application  
within 30 business days after receiving the application, the  
application shall be deemed approved.

(6) The certificate of franchise authority issued by the  
department shall contain:

HOUSE AMENDMENT FOR COUNCIL/COMMITTEE PURPOSES

Amendment No. (for drafter's use only)

23       (a) A grant of authority to provide cable service over a  
24       cable system as requested in the application.

25       (b) A grant of authority to construct, maintain, and  
26       operate facilities through, upon, over, and under any public  
27       right-of-way or waters.

28       (c) A statement that the grant of authority is subject to  
29       lawful operation of the cable system to provide cable service by  
30       the applicant or its successor in interest.

31       (7) A certificateholder that seeks to include additional  
32       service areas in its current certificate shall file notice with  
33       the department that reflects the new service area or areas to be  
34       served.

35       (8) The certificate of franchise authority issued by the  
36       department is fully transferable to any successor in interest to  
37       the applicant to which the certificate is initially granted. A  
38       notice of transfer shall be filed with the department and the  
39       relevant municipality or county within 14 business days  
40       following the completion of such transfer.

41       (9) The certificate of franchise authority issued by the  
42       department may be terminated by the cable service provider by  
43       submitting notice to the department.

44       (10) An applicant may challenge a denial of an application  
45       by the department in a court of competent jurisdiction through a  
46       petition for mandamus.

47       (11) The department may revoke a certificate of franchise  
48       authority in the event that a court of competent jurisdiction  
49       finds, pursuant to s. 610.114, that a certificateholder is in  
50       noncompliance with the requirements of this chapter after notice  
51       and a reasonable time to cure.



HOUSE AMENDMENT FOR COUNCIL/COMMITTEE PURPOSES

Amendment No. (for drafter's use only)

52       (12) The department shall adopt any procedural rules  
53 pursuant to ss. 120.536(1) and 120.54 necessary to implement  
54 this section.

55       (13) The department may establish a standard application  
56 form, in which case the application shall be on such form and  
57 must be accompanied by a one-time application fee established by  
58 the department, not to exceed \$10,000. The fees shall be based  
59 on the costs incurred by the department in performing its duties  
60 under the provisions of ss. 610.102-610.115.

61       (14) Beginning 3 years after approval of the  
62 certificateholder's initial certificate of franchise, and every  
63 3 years thereafter, the certificateholder shall update the  
64 information contained in the original application for a  
65 certificate of franchise. At the time of the filing of the  
66 information update, the certificateholder shall pay a processing  
67 fee, not to exceed \$1,000, for the costs incurred by the  
68 department in the handling of the information update.

69       (15) Beginning 10 years after approval of the  
70 certificateholder's initial certificate of franchise, and every  
71 10 years thereafter, the certificateholder shall file a renewal  
72 notice accompanied by an affidavit that contains the information  
73 required by subsection (4). At the time of the filing of the  
74 renewal notice, the certificateholder shall pay a fee, not to  
75 exceed \$10,000, established by the department. The fee shall be  
76 based on the costs incurred by the department in performing its  
77 duties under this subsection. Upon receipt of the notice of  
78 renewal and payment of the fee, the certificate shall be deemed  
79 automatically renewed unless the department files a notice of  
80 deficiency within 30 days. The certificateholder shall have 30  
81 days to cure any deficiency in its renewal notice.  
82

HOUSE AMENDMENT FOR COUNCIL/COMMITTEE PURPOSES

Amendment No. (for drafter's use only)

83 ===== T I T L E A M E N D M E N T =====

84 Remove line 21 and insert:

85 state authorization to provide cable services; providing

86 requirements and procedures; providing for fees; providing

87

HOUSE AMENDMENT FOR COUNCIL/COMMITTEE PURPOSES

2

Amendment No. (for drafter's use only)

Bill No. 1199

COUNCIL/COMMITTEE ACTION

ADOPTED \_\_\_\_\_ (Y/N)  
ADOPTED AS AMENDED \_\_\_\_\_ (Y/N)  
ADOPTED W/O OBJECTION \_\_\_\_\_ (Y/N)  
FAILED TO ADOPT \_\_\_\_\_ (Y/N)  
WITHDRAWN \_\_\_\_\_ (Y/N)  
OTHER \_\_\_\_\_

Council/Committee hearing bill: Commerce Council  
Representative(s) Traviesa offered the following:

**Amendment (with title amendment)**

Between lines 466 and 467, insert:

(13) In addition and subject to the requirements of ss. 610.102-610.114, a provider of competitive video programming services shall apply for and obtain a state-issued certificate of franchise authority under ss. 610.102-610.114, including all rights and obligations associated therewith, before providing such services in the state, notwithstanding that competitive video programming service is not a cable service as defined in s. 610.103. For purposes of ss. 610.102-610.114, the term "competitive video programming services" means video programming provided through wireline facilities located at least in part of the public right-of-way without regard to delivery technology, including Internet Protocol technology, provided that this definition does not include any video programming provided by a cable service operator, any video programming provided solely as part of interactive on-demand services, any video programming service provided by a commercial mobile service provider defined

HOUSE AMENDMENT FOR COUNCIL/COMMITTEE PURPOSES

Amendment No. (for drafter's use only)

in 47 U.S.C. s. 322(b), or any information service, as defined  
by Federal law.

===== T I T L E A M E N D M E N T =====

Remove lines 20 and 21 and insert:

authorizing authority; providing definitions; requiring  
state authorization to provide cable services and  
competitive video programming services; providing